THE MARK O. HATFIELD

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the U.S. District Court for the District of Oregon

A Court Publication Supported by the Attorney Admissions Fund

Vol. V, No. 7, April 8, 1999

Constitutional Law

A company that owns and markets machines that dispense emergency long distance phone cards filed an action against the Oregon State Police Superintendent alleging violation of its constitutional rights when the police seized the machines as illegal "gaming" devices under Oregon law. The machines sold two-minute phone cards for $1 each and then the purchase entitled the customer to enter a sweepstakes. It was also possible to enter the sweepstakes by requesting a marker without actually purchasing a phone card. Following the seizure, the state offered to return the machines in exchange for a release from liability.

Plaintiff's first claim sought a declaration that its machines did not violate state law. Judge Stewart held that this claim was barred by the Eleventh Amendment because it would entail a federal court determination of the meaning of a state law.

Plaintiff's second claim was that the proffered settlement agreement constituted extortion and violated plaintiff's First Amendment right to petition the government for redress. The court held that merely requesting a release of liability did not violate constitutional rights as a matter of law because to so hold, would impermissibly discourage settlements against public bodies.

Plaintiff's third claim was that the statute was unconstitutional as applied under the 4th and 14th Amendments. The court abstained from adjudicating this claim under the Pullman abstention doctrine. The court found that the complaint touched upon a sensitive area of social policy and that a definitive ruling from the state could avoid the constitutional issue. The court further noted that the plaintiff had adequate remedies under state law. Finally, the court declined to certify the question to the Oregon Supreme Court on grounds that the issues presented were more factual than legal. Diamond Game Enterprises v. Howland, CV 98-1242-ST (Opinion, March 23, 1999 - 24 pages).

Plaintiff's Counsel: Spencer Neal
Defense Counsel: Thomas Castle

Contracts

An Apartment Association filed an action against a manufacturer for damages allegedly suffered due to defective siding. Following prior proceedings, only two claims remained: one for breach of warranty and one for fraud. Defendant moved for summary judgment on grounds that any warranties were limited to the "original owners" and plaintiffs had purchased the siding from a wholesaler. The court noted that whether such a warranty was assignable was a difficult issue, but declined to reach it on grounds that plaintiff failed to establish that the siding it actually purchased was of a grade or quality that carried a warranty. The court noted that the evidence indicated that the siding bore paint stripes indicative of utility grade siding which carried no warranty. Judge Jones found that the fact that the price plaintiff paid for the siding was consistent with warrantied A grade was insufficient given other evidence. The court also dismissed the fraud claim which was premised upon statements made by defendant's inspectors that the plaintiff's siding was utility grade given the absence of evidence of the statements' falsity. Independence Apartments Assoc. v. Louisiana Pacific Corp., CV 97-721-JO (Opinion, March 31, 1999 - 14 pages).

Plaintiff's Counsel: Justine Fisher
Defense Counsel: Tom Sand

7 In a separate action involving claims of defective stucco siding, a defendant sought dismissal of breach of warranty claims on

grounds that plaintiffs failed to plead with particularity under Oregon's UCC. Judge Haggerty rejected the motion, finding that pleading requirements are procedural rather than substantive and thus, plaintiff need only comply with the notice pleading provisions of Fed. R. Civ. P. 8. The court also denied a defense motion to dismiss a gross negligence claim on grounds that such a claim was covered under plaintiff's general negligence allegations. The court found that gross negligence was a distinct claim under Oregon law and thus, was properly pled as a separate claim.

Judge Haggerty granted a defense motion to make the UTPA claim more definite and certain. The court noted that since there were multiple ways that the UTPA could be violated, plaintiff must specify how the defendant allegedly violated the Act. Ghiorso v. Dryvit Systems, Inc., CV 98-1338-HA (Opinion, March 19, 1999).

Plaintiff's Counsel: William Ghiorso
Defense Counsel: Robert Newell

Civil Rights

Bradly Cunningham brought an action against state and private media defendants alleging federal law claims under 42 U.S.C. § 1983 and state law claims for defamation, theft, and racketeering, arising out of the publication of the book Dead by Sunset, and the subsequent broadcasts of a television docudrama by the same name, which purports to depict the events leading to plaintiff's murder conviction. Judge Hogan granted the media defendants' motion to dismiss because the complaint failed to allege with specificity that the media defendants conspired with the state defendants such that the media defendants could be deemed to act under color of state law. Because plaintiff had previously been apprised of this deficiency in at least one other virtually identical case brought before the court, plaintiff was not granted leave to amend. Judge Hogan further dismissed the state law claims due to a lack of diversity or supplemental jurisdiction. Civil No. 98-1409-HO.

Announcement

From Magistrate Judge Janice Stewart: We are pleased to announce that effective immediately, Westlaw and Lexis will provide access to the unpublished opinions of this court. Those opinions will be designated "NOT FOR PUBLICATION" and will be periodically submitted to Westlaw and Lexis by the individual judges.

ADA

In Zimmerman v. State of Oregon, ___ F.3d ___, 1999 WL 144112 (9th Cir. Mar. 18, 1999), the 9th Cir. affirmed Judge Panner's decision (noted in a newsletter and published at 983 F. Supp. 1327) that Title II of the ADA does not apply to employment.

7 Plaintiff, a high school senior who repeated the 10th grade due to a learning disability, wanted to participate in interscholastic sports programs in his 9th and 10th semesters of high school. The OSAA's eligibility rules allow participation only for 8 consecutive semesters.

After a court trial, Judge Coffin ruled that the OSAA is a public entity under Title II of the Americans with Disabilities Act. Its actions are inextricably linked with state law, both as rulemaker for the State Board of Education and as agent for the public high schools.

An individualized assessment of plaintiff's disability showed that Bingham was disabled under the ADA, and that his extra year of school was a result of that disability.

At trial, the 8-semester rule was compared with the age and grade rules, all of which OSAA designated as essential eligibility requirements. The age and grade rules promote the same policies as the 8-semester rule, but they included specific waiver provisions for the learning disabled that were not included in the 8-semester rule.

Under the circumstances, Judge Coffin found that waiver of the 8-semester rule was a reasonable modification in part because OSAA already had established procedures for waiver of its other rules for the learning disabled. Processing additional waiver requests under the 8-semester rule thus would not impose an undue burden on OSAA. Adam Bingham v. Oregon School

Activities Association, (1999 WL 137800 (D.Or.)) No. 98-6282-TC (March 11, 1999).

Copies

Hard copies of referenced district court cases may be obtained by visiting the clerks office (.15/page) or by contacting the clerks office (326-8008 - civil; 326-8003 - criminal) (.50/page). **Computer copies of most district court opinions may be accessed free of charge simply by sending your request via e-mail to: kelly_zusman@ce9.uscourts.gov**